

August 4/92 - Globe Mail

Young Offenders Act under attack

Court asked to strike down public-protection criterion for trial as adult

BY THOMAS CLARIDGE
Courts Reporter

TORONTO — A lawyer is asking the courts to declare unconstitutional a provision in the Young Offenders Act that makes protection of the public the main consideration in deciding whether a person under 18 should be tried as an adult.

Toronto lawyer David Midanik represents a 16-year-old charged with murder. His submissions to an Ontario Court judge contend that the new law, which came into force last spring, contravenes both the Charter of Rights and Freedoms and several international covenants on civil rights and child protection.

Mr. Midanik also argued before Madam Justice Nola Garton of the court's General Division last week that the new provision represents a radical departure from previous Canadian laws.

He said his client would have been better protected under British common law, under which a child was not considered criminally responsible for his acts until one day before his 17th birthday.

He recalled that before the introduction of Canada's Juvenile Delinquents Act in 1908, a judge could, at his discretion, sentence a child to a home rather than to jail for any offence.

The Juvenile Delinquents Act allowed for children over the age of 14 to be tried as adults, but said that course "shall in no case be followed unless the court is of the opinion that the good of the child and the interest of the community demand" it. That law remained in force until the Young Offenders Act replaced it in the mid-1980s.

As originally worded, the Young Offenders Act appeared to place the interests of the accused young person ahead of society's interests. However, the act's new Section 16 states that, in weighing societal interests against the interests of rehabilitating the young accused, "protection of the public shall be paramount and the court shall order that the young person be proceeded against in ordinary court."

Mr. Midanik told the court that his client, who has been in custody since March, 1991, was jointly charged with a 15-year-old who has since been tried as a young offender, found guilty of manslaughter and sentenced to three years in closed custody.

(Although the Young Offenders Act amendments now permit sentences up to five years less a day, the teen-ager was tried under the original statute, which permitted a maximum sentence of only three years.)

Judge Garton is to resume hearings on the issue next month. If she rejects Mr. Midanik's motion and confirms the transfer to adult court, and if the youth is convicted there of first- or second-degree murder, he will face a mandatory life sentence and will not be eligible for parole for five to 10 years.

In written submissions to the court, Mr. Midanik suggested that courts have an obligation "to override the acts of legislatures where the rights of those traditionally protected by the courts have been violated."

He contended that the new transfer provision violates both the 1966 International Covenant on Civil and Political Rights, which requires the segregation of juvenile offenders from adults, and a requirement in the United Nations Standard Minimum Rules for the Administration of Juvenile Justice that "the well-being of the juvenile shall be the guiding factor in the consideration of her or his case."

The lawyer argued that the transfer provision violates several sections of the Charter of Rights and Freedoms, among them guarantees against being deprived of liberty "except in accordance with the principles of fundamental justice" and being "arbitrarily detained or imprisoned."

Mr. Midanik also contended that transfer hearings can lead to an accused young person having to give self-incriminating testimony and that youths facing murder charges in adult courts are subject to "cruel and unusual punishment."

Crown attorney John Sutherland asked Judge Garton to reject the constitutional challenge. He argued that many of Mr. Midanik's submissions "rely on the possibility that some event may happen in the future."

He cautioned the court not to take into account hypothetical situations, such as use of a youth's testimony at a transfer hearing against him during his trial, citing a refusal by the Ontario Court of Appeal to rule on a similar challenge against mandatory life sentences for transferees until after they had been imposed.

Mr. Sutherland also suggested that the defence lawyer was in some cases improperly asking the court to review "the wisdom, as opposed to the constitutionality, of the legislation."

Observing that the British Columbia Court of Appeal had found the original transfer provision constitutional, the Crown lawyer noted that the section itself contains no reference to penalties a transferee would face.